No. 14-723

# In the Supreme Court of the United States

ROBERT MONTANILE, PETITIONER

*v.*

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER


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## QUESTION PRESENTED

Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(3), allows a plan participant, beneficiary, or fiduciary to obtain an injunction or "other appropriate equitable relief" to redress statutory violations or to enforce ERISA or the terms of the plan. The question presented is:

Whether an action by an ERISA fiduciary against a plan participant to recover an overpayment by the plan seeks "equitable relief" within the meaning of ERISA Section 502(a)(3), 29 U.S.C. 1132(a)(3), where the fiduciary has not identified a particular fund that is in the participant's possession and control at the time that the fiduciary asserts its claim.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

### INTEREST OF THE UNITED STATES

The question presented in this case concerns the scope of "appropriate equitable relief" available in a civil action by a plan fiduciary under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(3). The Secretary of Labor has primary authority for administering Title I of ERISA.

### STATEMENT

1. Petitioner was a participant in the National Elevator Industry Health Benefit Plan (the Plan), an employee welfare plan governed by ERISA and administered by respondent. Pet. App. 2-3. The Plan, which afforded health-care benefits to participants, provided that respondent had "the right to recover

benefits advanced by the Plan to a covered person for expenses or losses caused by another party."[1] *Id.* at 22. The Plan further provided that "[a]mounts that have been recovered by a covered person from another party are assets of the Plan by virtue of the Plan's subrogation interest and are not distributable to any person or entity without the Plan's written release of its subrogation interest." *Ibid.*

In December 2008, petitioner was injured in a car accident. Pet. App. 6. The Plan paid petitioner's initial medical expenses of $121,044.02. *Ibid.* Petitioner sued the driver of the other car and obtained a $500,000 settlement. *Ibid.* Respondent then attempted to recover from petitioner the medical expenses the Plan had paid. *Id.* at 7. Between June 2011 and January 2012, respondent and petitioner engaged in negotiations concerning whether the Plan's provisions gave respondent a right to reimbursement, and if so, the amount respondent was owed. *Ibid.* When negotiations broke down in January 2012, petitioner's counsel informed respondent that he would disburse the funds received in the settlement to petitioner in 14 days. J.A. 35. In February 2012, having received no response, petitioner's counsel disbursed the funds. *Ibid.*

2. In July 2012, respondent filed this suit under ERISA Section 502(a)(3), seeking reimbursement of the medical expenses paid by the Plan. Section 502(a)(3) authorizes a plan fiduciary to bring a civil action "to obtain * * * appropriate equitable relief

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[1] The relevant provisions are contained in a summary plan description that the court of appeals concluded was a "governing Plan document" containing "enforceable plan terms." Pet. App. 16-17. Petitioner does not challenge that ruling. See *US Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537, 1541 n.1 (2013).

* * * to enforce any provisions of [ERISA] or the terms of the plan." 29 U.S.C. 1132(a)(3)(B)(ii); Pet. App. 24-25. Respondent alleged that "all or part of the settlement proceeds are within the actual or constructive possession of [petitioner]" and claimed that the Plan was "entitled to equitable restitution in the form of a constructive trust or equitable lien with respect to the disputed funds held in [petitioner's] actual or constructive possession." Pet. App. 7.

Respondent moved for summary judgment, relying on *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), which held that a fiduciary seeks "equitable relief" within the meaning of Section 502(a)(3) when it seeks to enforce an equitable lien by agreement against "specifically identifiable funds"—*i.e.*, those funds recovered from a third party—that are "within the possession and control" of the participant or beneficiary. *Id.* at 362-363 (citation and internal quotation marks omitted). Petitioner cross-moved for summary judgment, arguing, among other things, that he no longer possessed the settlement funds. Pet. App. 8. Under *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002), petitioner contended, a fiduciary may not enforce an equitable lien when the relevant funds are not in the beneficiary's possession. In that situation, petitioner maintained, a claim for reimbursement seeks legal relief because it seeks recovery from the beneficiary's general assets. Pet. App. 8.

The district court held that respondent was entitled to reimbursement for the full amount of the medical costs it had provided to petitioner. Pet. App. 19-45. The court reasoned that the Plan's terms created an equitable lien by agreement in any third-party recov-

ery petitioner received, and "a beneficiary's dissipation of assets is immaterial when a fiduciary asserts an equitable lien by agreement." *Id.* at 40.

3. The court of appeals affirmed, Pet. App. 1-18, concluding that this case was controlled by its recent decision in *AirTran Airways, Inc.* v. *Elem*, 767 F.3d 1192 (2014), petition for cert. pending, No. 14-1061 (filed Feb. 27, 2015). Pet. App. 10-11. In *AirTran*, the court of appeals held that where a plan provision gave the plan a first-priority claim to all payments made by a third party, an equitable lien attached to any settlement funds the beneficiary received. 767 F.3d at 1198. In the court's view, the beneficiary's subsequent dissipation of the funds "could not destroy the lien that attached *before*" the dissipation. *Ibid.* The court based that conclusion on *Sereboff*, which held that a fiduciary "need not trace the settlement fund back to [the fiduciary] to enforce its equitable lien." *Ibid.*

The court of appeals distinguished *Great-West*, which had held that the fiduciary sought legal relief because the funds subject to the lien were not in the beneficiary's possession, on the ground that the beneficiary in *Great-West* had "never possessed the settlement fund" because it had been placed directly in a special needs trust. *AirTran*, 767 F.3d at 1198.

## SUMMARY OF ARGUMENT

Section 502(a)(3) of ERISA authorizes "appropriate equitable relief * * * to enforce * * * the terms of [an ERISA] plan." 29 U.S.C. 1132(a)(3). This Court's decisions and traditional principles of equity establish that an ERISA fiduciary may use Section 502(a)(3) to obtain reimbursement from a beneficiary only if the fiduciary seeks to enforce an equitable lien or constructive trust against identified funds that remain in

the beneficiary's possession and control at the time of suit.

I. In *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002), this Court held that Section 502(a)(3) does not permit a fiduciary to obtain legal damages against a plan participant or beneficiary who has failed to reimburse the plan for medical expenses paid by the plan and later recovered from a third party. *Id.* at 207. To seek relief that qualifies as "equitable" under Section 502(a)(3), the fiduciary must assert an equitable lien or constructive trust against identified funds in the beneficiary's possession—namely, the funds recovered from the third party. *Id.* at 213-214 (citation omitted). If the beneficiary has "dissipated [the recovery] so that no product remains," the fiduciary can no longer "enforce a constructive trust or an equitable lien" against those funds. *Ibid.* In that situation, any pecuniary award would come out of the beneficiary's general assets and would constitute legal relief not authorized by Section 502(a)(3). *Ibid.*

Accordingly, because the beneficiary in *Great-West* did not possess the funds in question—they had been disbursed to a special needs trust—the Court held that the fiduciary could not recover under Section 502(a)(3). The Court reaffirmed that understanding of "equitable relief" in *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), in which it held that the fiduciary could assert an equitable lien under Section 502(a)(3) because the funds in question remained in the beneficiaries' possession.

*Great-West* and *Sereboff* thus establish that a fiduciary may assert an equitable lien only against identified funds in the plan participant's possession at the

time of suit. That conclusion is reinforced by the traditional equitable principles on which this Court has relied in construing Section 502(a)(3). At equity, an equitable lien or constructive trust was understood to be an interest in particular property, rather than a right to a money judgment against the defendant's general assets. 4 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 1234, at 694 (Spencer W. Symons ed., Bancroft-Whitney Co. 5th ed. 1941) (1883) (*Pomeroy*). If the defendant dissipated the property, the lien or trust could no longer be enforced. 1 Restatement of Restitution § 161 cmt. e, at 653 (1937) (Restatement); *id.* § 160 cmt. g, at 648.

Respondent argues that equity courts could award monetary relief in the form of a deficiency judgment or damages when the property subject to a lien had been partially or wholly dissipated. But those remedies were understood to be legal, not equitable, relief that an equity court could award as a matter of ancillary jurisdiction. This Court has explained that "equitable relief" under Section 502(a)(3) does not include the legal remedies a court of equity was "empowered to provide in the particular case at issue." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 256 (1993).

Permitting a fiduciary to enforce an equitable lien only against identified third-party recovery funds in the defendant's possession is consistent with ERISA's design. To be sure, in some cases, the beneficiary's disposition of the funds will prevent the fiduciary from recovering the reimbursement to which it is entitled. But that possibility has been clear since *Great-West*, and Congress has not acted to override this Court's construction of Section 502(a)(3) in reimbursement cases. In addition, fiduciaries have adopted several

practices designed to protect their rights to reimbursement, including pursuing third-party recoveries as subrogee of the beneficiary's claims, or restraining the beneficiary's disposition of any recovery obtained.

II. Even if this Court were to conclude that the monetary remedies respondent proposes are "equitable relief" under Section 502(a)(3), respondent would not be entitled to relief unless it can satisfy those remedies' prerequisites. At equity, courts awarded deficiency judgments only when the defendant still possessed some property subject to the lien, and they awarded damages only when the defendant had disposed of the property in bad faith. Because respondent did not press those theories below, a remand would be necessary to permit the lower courts to address them in the first instance.

## ARGUMENT

### I. A FIDUCIARY MAY NOT OBTAIN REIMBURSEMENT UNDER SECTION 502(a)(3) WHEN THE BENEFICIARY NO LONGER POSSESSES THE FUNDS RECOVERED FROM A THIRD PARTY

The court of appeals erred in holding that ERISA Section 502(a)(3) allows a plan fiduciary to recoup payments from a participant or beneficiary who has received a third-party tort recovery regardless of whether the participant still possesses those funds. This Court's decisions in *Great-West* and *Sereboff*, as well as traditional equitable principles, establish that a fiduciary seeks "equitable relief" within the meaning of Section 502(a)(3) if it asserts an equitable lien by agreement against identified funds or property in the beneficiary's possession and control at the time of suit. But where the funds are no longer in the beneficiary's possession, the fiduciary's claim is one for

reimbursement out of the beneficiary's general assets—in other words, it is a claim for legal damages rather than "equitable relief" under Section 502(a)(3). Although the beneficiary's disposition of recovered funds may thus prevent the fiduciary from obtaining reimbursement in some cases, since *Great-West*, fiduciaries have mitigated the potential unfairness of that result by employing a number of methods.

### A. This Court's Precedents Establish That Section 502(a)(3) Permits A Fiduciary To Assert An Equitable Lien Or Constructive Trust Against Identified Funds Or Property In The Beneficiary's Possession, But Does Not Permit An Award Of Legal Damages Against The Beneficiary's General Assets

#### *1. This Court has held that an equitable lien or constructive trust may be enforced only when the identified funds are in the beneficiary's possession*

a. In *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), this Court construed Section 502(a)(3)'s provision for plan participants, beneficiaries, and fiduciaries to seek appropriate "equitable relief" to enforce the terms of an ERISA plan. The Court held that a claim by plan participants against a non-fiduciary third party who provided services to a plan, seeking "monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties," did not seek "equitable relief." *Id.* at 255. In substance, the Court explained, the plaintiffs sought "[m]oney damages" compensating for the plan's losses—in other words, "the classic form of *legal* relief." *Ibid.*

The Court held that "equitable relief" under Section 502(a)(3) includes only "those categories of relief that were *typically* available in equity (such as injunc-

tion, mandamus, and restitution, but not compensatory damages)." *Mertens*, 508 U.S. at 256. The Court rejected the argument that legal damages could be considered relief "typically available in equity" because an equity court could in certain circumstances award damages. *Ibid.* (emphasis omitted). The Court recognized that "there were many situations * * * in which an equity court could 'establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority.'" *Id.* at 256 (quoting 1 *Pomeroy* § 181, at 257); see also 1 *Pomeroy* § 231, at 410. But the Court concluded that if Section 502(a)(3) permitted courts to award "whatever [legal] relief a court of equity is empowered to provide in the particular case at issue," *Mertens*, 508 U.S. at 256, Congress's provision that the relief must be "equitable" would cease to have meaning, *id.* at 257.

b. The Court has twice applied the principles set forth in *Mertens* to a fiduciary's attempt to enforce a plan reimbursement provision against a plan participant or beneficiary who received medical benefits following an injury.

i. In *Great-West*, the Court determined that Section 502(a)(3) did not permit a reimbursement action against a plan beneficiary who received medical benefits following a car accident. 534 U.S. at 207. The beneficiary had obtained a recovery in a tort settlement with third parties, and the plan's terms gave the plan a right to reimbursement out of that recovery. After the fiduciary's effort to obtain a temporary restraining order (TRO) preventing dissipation of the settlement funds was unsuccessful, see *id.* at 226 (Ginsburg, J., dissenting), the funds were disbursed. One portion went directly into a special needs trust

for the beneficiary, and another went to the participant's attorney, who deducted his own fees and used the remainder to pay the beneficiary's other creditors. *Id.* at 214.

In rejecting the fiduciary's argument that it sought "equitable relief" in the form of restitution, the Court explained that restitution can be either legal or equitable, depending upon the basis for the claim and the nature of the underlying remedies sought. *Great-West*, 534 U.S. at 212-213 (citations omitted). A "plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* at 213. But where the plaintiff did not seek to impose a constructive trust or equitable lien on particular funds or property in the defendant's possession, the Court explained, the suit did not seek equitable relief, but instead sought "the imposition of personal liability," a legal remedy. *Id.* at 214.

The Court further noted that "where 'the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor,' and the plaintiff 'cannot enforce a constructive trust or an equitable lien upon other property of the [defendant].'" *Great-West*, 534 U.S. at 213-214 (brackets in original) (quoting Restatement § 215 cmt. a, at 867). Because the settlement funds in *Great-West* were not in the beneficiary's possession, the Court held that the fiduciary sought, "in essence, to impose personal liability on [the participant] for a contractual obligation to pay money—relief that was not typically available in equi-

ty," and thus not available under ERISA Section 502(a)(3). *Id.* at 210; see *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1878-1879 (2011).

ii. Subsequently, in *Sereboff*, the Court addressed a claim for reimbursement where the beneficiaries had placed the portion of their tort recovery claimed by the plan in an investment account pending resolution of the reimbursement dispute. 547 U.S. at 360. The Court explained that to qualify as "equitable relief" under Section 502(a)(3), a claim must fulfill two requirements: (1) the remedy sought must be equitable in nature, and (2) the "basis for [the] claim" must also be equitable. *Id.* at 363 (citing *Great-West*, 534 U.S. at 213). With respect to the latter requirement, the Court held that basis for the fiduciary's claim was equitable because the fiduciary sought to enforce an "equitable lien 'by agreement'" based on plan terms identifying a specific fund (*i.e.*, any third-party recovery received by the beneficiary) to which the fiduciary was entitled. *Id.* at 364-365 (citation omitted).

With respect to the equitable-remedy requirement, the Court held that because the beneficiaries, unlike the beneficiary in *Great-West*, possessed the particular funds in question, the "impediment to characterizing the relief in [*Great-West*] as equitable is not present." *Sereboff*, 547 U.S. at 362. Although the fiduciary in *Sereboff*, like the fiduciary in *Great-West*, "alleged breach of contract and sought money," its claim was directed to "'specifically identifiable funds' that were 'within the possession and control of the [beneficiaries]—that portion of the tort settlement due [the fiduciary] under the terms of the ERISA plan, set aside and 'preserved' [in the beneficiaries'] investment accounts." *Id.* at 362-363 (citation omitted). The fidu-

ciary's claim could therefore be characterized as seeking "recovery through a constructive trust or equitable lien on a specifically identified fund, not from the [beneficiaries'] assets generally, as would be the case with a contract action at law." *Id.* at 363; see *US Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537, 1544-1545 (2013) (the "nature of the recovery" requested in *Sereboff* was "equitable because [the fiduciary] claimed 'specifically identifiable funds' within the [beneficiaries'] control").

c. *Great-West* and *Sereboff* thus make clear that a claim seeking monetary relief for a beneficiary's breach of plan terms must be directed at particular funds or property in the defendant's possession. Otherwise, the plan would be seeking reimbursement from the beneficiary's general assets. That relief is legal, not equitable, in nature. *Great-West*, 534 U.S. at 213-214; *Sereboff*, 547 U.S. at 362-363.

In this case, petitioner asserts that he no longer possesses the bulk of the third-party tort settlement he received. Pet. Br. 9; see Pet. App. 35 n.2.[2] Under *Great-West*, respondent may seek to enforce an equitable lien or constructive trust only against the portion of the recovery (if any) that petitioner still possesses. To the extent the "property * * * or its proceeds have been dissipated so that no product remains," respondent may not "enforce a constructive trust of or an equitable lien upon other property of"

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[2] As the district court explained, the record does not reveal how much, if any, of the settlement funds petitioner still possesses. Pet. App. 35-36 & n.2. Petitioner asserted that after making various payments, he was left with "approximately $90,000," most of which he spent on living expenses. *Id.* at 36. Respondent disputes the accuracy of that account.

petitioner. *Great-West*, 534 U.S. at 213-214 (citation omitted). The Court reaffirmed that principle in *Sereboff*, explaining that where, as here, the "particular fund" identified by the fiduciary has been dissipated, the fact that the fiduciary would have to seek reimbursement from the beneficiary's general assets creates an "impediment to characterizing the relief * * * as equitable." 547 U.S. at 362-363.

*2. Respondent's attempts to avoid the import of* Great-West *and* Sereboff *are unpersuasive*

In its effort to avoid the force of *Great-West* and *Sereboff*, respondent reiterates the arguments on which the court of appeals relied in *AirTran Airways, Inc.* v. *Elem*, 767 F.3d 1192 (11th Cir. 2014). Those arguments lack merit.

a. Respondent first relies on the Court's statement in *Sereboff* that the plan's "inability to satisfy the 'strict tracing rules' for 'equitable restitution' is of no consequence," 547 U.S. at 365 (citation omitted). See Br. in Opp. 17; *AirTran*, 767 F.3d at 1198. That statement, respondent argues, negates the need to identify specific funds in the beneficiary's possession against which an equitable lien can be enforced. In respondent's view, so long as the beneficiary possessed the funds at some point, "the beneficiary's promise will be enforced in equity," even if the funds can no longer be "traced" because the beneficiary has spent them. Br. in Opp. 17.

Respondent misunderstands *Sereboff*'s discussion of the equitable-tracing rule at issue in that case. The beneficiaries in *Sereboff* claimed that an equitable lien could not be enforced unless the fiduciary could "trace" the identified funds in the beneficiaries' possession back to property that had been *in the ERISA*

*plan's possession* when the beneficiaries had wrongfully appropriated it. 547 U.S. at 364 (citation omitted). In rejecting that argument, the Court explained that an "equitable lien was imposed as restitutionary relief" in several different situations, one of which involved misappropriation—namely, a claim that "an asset belonging to the plaintiff had been improperly acquired by the defendant." *Ibid.* When a plaintiff asserted an equitable lien based on misappropriation, he was required to demonstrate that the property in the defendant's possession could be "trace[d]" to property originally held by the plaintiff. *Id.* at 364-365. By contrast, a fiduciary's claim for reimbursement required by plan terms is based on a "different species" of equitable lien: an "equitable lien 'by agreement'" that arises out of the beneficiary's contractual promise to reimburse the plan out of any third-party recovery. *Id.* at 365 (citation omitted); see *id.* at 364. An equitable lien by agreement, the Court explained, was traditionally not subject to the requirement that the property in the defendant's possession be traceable to the plaintiff because the property in question might have been transferred to the defendant by a third party. *Id.* at 365. The Court therefore concluded that it would be inappropriate to impose a tracing requirement "of the sort asserted by the [beneficiaries]" in the context of a reimbursement suit by a fiduciary. *Ibid.*

The Court's rejection of the tracing requirements applicable to equitable liens based on misappropriation does not suggest that the Court abandoned the requirement—applicable to equitable liens generally —that the lien may be enforced only against identified funds in the defendant's possession. To the contrary,

the Court had just reaffirmed *Great-West*'s holding that for reimbursement relief to be equitable in nature, the plan must identify funds in the beneficiary's possession against which the lien could be enforced. *Sereboff*, 547 U.S. at 362-363. And the Court had just distinguished *Great-West* on the ground that the Sereboffs, unlike the participant in *Great-West*, retained possession of the funds at issue. *Ibid.* It is exceedingly unlikely that the *Sereboff* Court immediately followed those admonitions with (as respondent would have it) directly contrary reasoning that would permit a plan to pursue recovery out of the beneficiary's general assets when the beneficiary has already spent the specific funds in question.

b. Respondent, like the court of appeals, seeks to distinguish *Great-West* on the ground that there the beneficiary never possessed the settlement fund, "so the lien never attached to anything held by the beneficiary. Br. in Opp. 18; see *AirTran*, 767 F.3d at 1198. In this case, respondent argues, "the lien * * * attached" when the funds came into petitioner's possession, and therefore the lien must be enforceable without regard to whether the funds are still in petitioner's possession. Br. in Opp. 18. That argument is refuted by *Great-West* and the equity authorities on which it relied.

The Court in *Great-West* never suggested that the dispositive consideration was that the beneficiary had never possessed the funds. Rather, *Great-West* relied on the fact that the funds "*are not* in [the beneficiaries'] possession." 534 U.S. at 214 (emphasis added). For purposes of characterizing the plan's claim as either legal or equitable, what mattered was whether the beneficiaries "hold [the] particular funds." *Ibid.*

Because the beneficiaries did not hold the funds at the time the fiduciary sought to enforce the lien, there was no property against which that lien could be enforced. *Ibid.* The Court reaffirmed that conclusion in *CIGNA*, stating that "relief that sought a lien or a constructive trust was legal relief, not equitable relief, unless the funds in question were '*particular* funds or property in the defendant's possession.'" 131 S. Ct. at 1879 (quoting *Great-West*, 534 U.S. at 213). The equitable authorities on which *Great-West* relied reinforce the point, explaining that an equitable lien cannot be enforced when the defendant "once had property" subject to the lien but then "dissipate[d]" it. Restatement § 215 cmt. a, at 866; see pp. 18-21, *infra*.

c. Finally, respondent contends (Br. in Opp. 18) that *Great-West* "dealt only with equitable restitution," that "equitable restitution" and "equitable liens by agreement" are categorically different types of relief, and that *Sereboff* established that any "present-possession" requirement recognized in *Great-West* does not apply to equitable liens by agreement. *Id.* at 17. Respondent is incorrect.

As *Sereboff* explained, to qualify as "equitable relief" under Section 502(a)(3), the remedy sought must be equitable in nature, and the "basis for [the] claim" must also be equitable. 547 U.S. at 363. *Great-West*'s discussion of the "present-possession" requirement pertained to the equitable-remedy element. 534 U.S. at 213. A claim for monetary reimbursement qualifies as an equitable remedy if it can be characterized as "restitution *in equity*"—*i.e.*, if the plaintiff seeks to enforce an equitable lien or constructive trust against "particular funds or property in the defendant's possession." *Ibid.*

*Sereboff* then elaborated on the requirement that the "basis for [the] claim" must be equitable. 547 U.S. at 363. The Court explained that there are multiple "claim[s]" or theories that could underlie a request for an equitable lien, distinguishing between an "equitable lien sought as a matter of restitution" (*i.e.*, where the defendant has misappropriated the plaintiff's property) and "an equitable lien 'by agreement,'" (*i.e.*, where the defendant has breached an agreement). *Id.* at 363-365. In rejecting the beneficiary's argument that the tracing rules for equitable liens based on misappropriation should apply to plan reimbursement claims, *Sereboff* clarified that the type of claim asserted by an ERISA fiduciary seeking reimbursement is an equitable lien by agreement. *Id.* at 364-365. *Sereboff* further explained that *Great-West* had addressed only the equitable-remedy aspect of the analysis and had not implicitly held that plan reimbursement claims are subject to the requirements for equitable liens based on misappropriation. *Id.* at 365; but cf. Br. in Opp. 18.

*Sereboff* did not suggest, as respondent contends, that *Great-West*'s present-possession requirement disappears when a fiduciary asserts an equitable lien by agreement. It is true that when a fiduciary seeks to enforce an equitable lien by agreement, it has asserted an equitable "basis for its claim"; but it must then also establish that it seeks an equitable remedy—in other words, that it seeks reimbursement from specified funds in the beneficiary's possession. *Sereboff*, 547 U.S. at 363, 365. *Sereboff* made that clear by applying the present-possession requirement to the fiduciary's claim based on an equitable lien by agreement. *Id.* at 362.

### B. Traditional Principles Of Equity Confirm That An Equitable Lien Is Enforceable Only Against Identified Funds In The Defendant's Possession

The conclusion that a fiduciary may enforce an equitable lien or constructive trust only against identified funds in the beneficiary's possession is reinforced by the principles of equity to which this Court has looked when analyzing the types of relief available under ERISA Section 502(a)(3). See, *e.g.*, *Sereboff*, 547 U.S. at 362-363; *Great-West*, 534 U.S. at 213-214; *Mertens*, 508 U.S. at 256.

#### *1. An equitable lien or constructive trust must be enforced against particular property in the defendant's possession*

a. An equitable lien "constitutes a charge or encumbrance upon [a particular] thing, so that the very thing itself may be proceeded against in an equitable action, and either sold or sequestered under a judicial decree," with the proceeds "applied upon the demand of the creditor in whose favor the lien exists." 4 *Pomeroy* § 1233, at 692. That general rule holds when the equitable lien is established by agreement: the contract in question "recognizes, *in addition to the personal obligation*, a peculiar right over the thing concerning which the contract deals." *Id.* § 1234, at 695. When an agreement establishes such a right, "the plaintiff is enabled to follow the identical thing, and to enforce the defendant's obligation by a remedy which operates directly upon that thing." *Ibid.*

At equity, it followed from those general principles that an "equitable lien [could] be established and enforced only if there [was] some property which [was] subject to the lien." Restatement § 161 cmt. e, at 652. The authorities thus emphasized that "[i]t is

essential to an equitable lien that the property to be charged should be capable of identification." 1 Leonard A. Jones, *A Treatise on the Law of Liens* § 34, at 24 (rev. 2d ed. 1894) (*Jones*); see 4 *Pomeroy* § 1234, at 695 ("The doctrine of 'equitable liens' * * * was introduced for the sole purpose of furnishing a ground for the specific remedies which equity confers, operating upon particular identified property, instead of the general pecuniary recoveries granted by courts of law."). To be sure, "[w]here property is subject to an equitable lien and the owner of the property disposes of it and acquires other property in exchange, he holds the property so acquired subject to the lien."[3] Restatement § 161 cmt. e, at 652-653; see *id.* §§ 202(b), 203, at 818, 828. Similarly, when the property in question is "mingled with other property in one indistinguishable mass, the lien can be enforced against the mingled mass." *Id.* § 161 cmt. e, at 653.

As particularly relevant here, however, where "the property subject to the equitable lien [or constructive trust] can no longer be traced, the equitable lien cannot be enforced." Restatement § 161 cmt. e, at 653; see, *e.g.*, *Freshwater* v. *Colonial Prod. Credit Ass'n*, 334 S.E.2d 142, 145 (S.C. Ct. App. 1985) (where party "dissipated" proceeds allegedly subject to an equitable lien by agreement, there was "nothing to which the equitable lien could attach"). That is because "[t]he equitable lien is destroyed by the dissipation of the fund." *Whiting* v. *Hudson Trust Co.*, 138 N.E. 33, 38

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[3] If petitioner had exchanged the identified funds for other identifiable property, respondent could enforce the lien against that property. In addition, if a third party had taken possession of the identified funds with notice of the lien, respondent could enforce the lien against that party. See 4 *Pomeroy* § 1235, at 696.

(N.Y. 1923) (citing *Schuyler* v. *Littlefield*, 232 U.S. 707 (1914)). Thus, "where a person wrongfully disposes of the property of another but the property cannot be traced into any product, the other has merely a personal claim against the wrongdoer and cannot enforce a constructive trust or lien upon any part of the wrongdoer's property."[4] Restatement § 215(1), at 866; see *Great-West*, 534 U.S. at 213-214 (quoting Restatement § 215 cmt. a, at 867).

b. Similarly, a constructive trust may not be enforced against a constructive trustee, such as a plan participant or beneficiary in an overpayment case, who dissipated the assets at issue.[5] See, *e.g.*, 4 *Pomeroy* § 1058c, at 148-149 (property is subject to constructive trust only if it can be identified); Restatement § 160 cmt. g, at 648 (constructive trust cannot be enforced when "property is transferred to a bona fide purchaser" without notice); *id.* § 172, at 691-692. That was so because a "constructive trust, unlike an express trust, is not a fiduciary relation." *Id.* § 160 cmt.

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[4] It therefore does not matter that "the lien * * * attached" when the funds came into petitioner's possession. Br. in Opp. 18. At equity, when the defendant disposed of property to which a lien had attached, the lien could no longer be enforced.

[5] Because any trust in this case was constructive, not express, make-whole relief against petitioner personally in the form of an equitable surcharge is unavailable. This Court recently held that ERISA Section 502(a)(3) allows a suit *by* a plan participant for an equitable surcharge against a plan fiduciary, "whom ERISA typically treats as a trustee." *CIGNA*, 131 S. Ct. at 1879. ERISA fiduciaries are expressly charged under the statute with the highest trust-law duties of loyalty and care. See *Mertens*, 508 U.S. at 253, 262-263. But nothing in the statutory scheme itself imposes similar fiduciary obligations on plan participants and beneficiaries.

a, at 641; see generally 5 Austin Wakeman Scott, *The Law of Trusts* § 462.1, at 3415 (3d ed. 1967).

***2. Respondent is incorrect in arguing that monetary compensation for dissipated property was traditionally treated as equitable relief***

Respondent contends (Br. in Opp. 18-20) that courts of equity awarded monetary relief as a substitute for enforcing an equitable lien or constructive trust when the entire property subject to the lien was no longer in the defendant's possession. In particular, respondent argues that it is entitled either to a deficiency judgment or to damages. In equity, however, both types of relief were considered legal in nature, and equity courts awarded them purely as a matter of ancillary jurisdiction.

*a. Deficiency judgments*

At equity, an equitable lien was traditionally enforced through foreclosure of the identified property in the defendant's possession. 1 Dan B. Dobbs, *Law of Remedies* § 1.4, at 19 (2d ed. 1993) (*Dobbs*). When the foreclosure sale of the property did not result in proceeds sufficient to satisfy the defendant's debt to the plaintiff, equity courts could award a money judgment, often called a deficiency judgment, for the amount of the shortfall. 1 *Pomeroy* § 240, at 450. That remedy was legal in nature, however, and equity courts had authority to award it only as part of their ancillary jurisdiction to award complete relief between the parties.

In cases in which "a court of equity ha[d] obtained jurisdiction over some portion or feature of a controversy," it generally had ancillary jurisdiction to "proceed to decide the whole issues, and to award com-

plete relief, although the rights of the parties are strictly legal, and the final remedy granted is of the kind which might be conferred by a court of law." 1 *Pomeroy* § 231, at 410; see *id.* § 181, at 257 (equity court may "grant legal remedies which would otherwise be beyond the scope of its authority"). Such relief was sometimes called "clean up" relief, *Dobbs* § 2.7, at 180, and the rationale for permitting courts to award it was to promote "economy of litigation." *ibid.*; 1 *Pomeroy* § 242, at 456.

According to Pomeroy, one example of a supplemental legal remedy that could be awarded by an equity court was a "money judgment[]" in the form of a deficiency judgment. 1 *Pomeroy* § 240, at 450. Thus, when equity courts awarded monetary relief because the sale of the property securing an equitable lien did not fully satisfy the plaintiff's interest, they understood that remedy to be legal, not equitable, in nature. See, *e.g.*, *Jefferson Standard Life Ins. Co.* v. *Buckman*, 82 F.2d 125, 126 (5th Cir. 1936) ("the ascertainment of the amount of a debt and giving judgment for it is the function of a court of law, so that a deficiency decree is ordinarily an encroachment upon the jurisdiction of the law courts").

Indeed, deficiency judgments were initially thought to be a form of legal relief that fell outside of equity jurisdiction altogether. Nineteenth-century chancery courts in the United States and England viewed deficiency judgments as an exception to the rule that equity courts could award legal as well as equitable relief, and they held that deficiency judgments "could only be obtained by an action at law." 1 *Pomeroy* § 240, at 451; see *Noonan* v. *Lee*, 67 U.S. 499, 509 (1863). Eventually, through "statutory provisions

authorizing a personal judgment or through judicial decisions upholding the right," equity courts obtained the authority to "render a deficiency judgment" in order to "relieve parties from the expense and vexation of two suits, one equitable and the other legal, where the whole controversy could be adjusted in the suit." 1 *Pomeroy* § 240, at 451.

Federal Rule of Equity 10, on which respondent relies (Br. in Opp. 19), was one such measure. That rule provided that "[i]n suits for the foreclosure of mortgages, or the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale." Fed. R. Equity 10 (1912). As this Court explained, Rule 10 and its predecessor, Rule 92, "enlarg[ed] the Chancellor's jurisdiction, in order to completely dispose of the cause before him." *Hartford Accident & Indem. Co.* v. *Southern Pac. Co.*, 273 U.S. 207, 217-218 (1927). It was thus an application of the general equitable principle that a court may "award complete relief, even where the rights of parties are strictly legal and the final remedy granted is of the kind which might be conferred by a court of law." *Ibid.* After the Rule's adoption, courts continued to characterize the deficiency judgment as legal in nature.[6] See, *e.g.*, *Jefferson Standard*, 82 F.2d at 126 (Rule 10 permits a

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[6] The decisions on which respondent relies (Br. in Opp. 19) do not suggest that a deficiency judgment under Rule 10 was considered equitable in nature. See *Continental-Equitable Title & Trust Co.* v. *National Props. Co.*, 273 F. 967, 969 (D. Del. 1921) (explaining that Rule 10 provided ancillary jurisdiction, and approvingly citing *Frank* v. *Davis*, 31 N.E. 1100 (N.Y. 1892), which stated that deficiency judgments were legal relief); *Phelps* v. *Loyhed*, 19 F. Cas. 461 (C.C.D. Minn. 1871) (No. 11,077) (stating that court had power to grant deficiency decree).

deficiency decree notwithstanding its legal nature.); *Northwestern Mut. Life Ins. Co.* v. *Keith*, 77 F. 374, 375 (8th Cir. 1896) (same). Contrary to respondent's contention, then, Rule 10 does not suggest that a deficiency judgment was equitable in nature; rather, it demonstrates the opposite.

*b. Damages for destruction of a lien*

Respondent also suggests that equity courts could award "compensation" when a defendant dissipated or destroyed property to which a lien had attached. See Br. in Opp. 19 (citing *Otis* v. *Otis*, 45 N.E. 737 (Mass. 1897)). But that remedy was also legal in nature.

In equity, some courts stated that "[i]f the owner of property subject to an equitable lien disposes of it, in hostility to the lien, so that the lien is destroyed," the lienor may seek "damages for the destruction of the lien." *Jones* § 95, at 65; see *Hale* v. *Omaha Nat'l Bank*, 64 N.Y. 550, 555 (1876). A damages award for destruction of a lien was, like a deficiency judgment, legal relief that a court in equity could award as a matter of its ancillary jurisdiction. See *Jones* §§ 1034, 1036, at 678-679 (remedy was action for trover, a legal remedy, to obtain "compensation" for loss); see also *Hovey* v. *Elliott*, 23 N.E. 475, 478 (N.Y. 1890) ("action at law" for destruction of lien); *J.G. White Eng'g Corp.* v. *People's State Bank*, 87 So. 753, 756 (Fla. 1921) (when property held subject to a mortgage is destroyed, "such mortgagee's remedy would be at law, in an action on case, for such damages as he may sustain"); *Shultz* v. *Shively*, 143 P. 1115, 1119 (Or. 1914) (same).

### *3. Respondent may not obtain legal relief under Section 502(a)(3) simply because equity courts had authority to award that relief*

The monetary relief that respondent seeks here is precisely the sort of relief that this Court has held is unavailable under Section 502(a)(3). In *Mertens*, the Court expressly rejected the argument that legal relief that an equity court could award pursuant to its ancillary jurisdiction constituted "equitable relief" for purposes of Section 502(a)(3). 508 U.S. at 256 (citing Pomeroy's discussion of "clean up" relief, 1 *Pomeroy* § 181, at 257); see pp. 8-9, *supra*. And in *Great-West*, all nine Members of the Court reaffirmed that compensatory damages against a non-fiduciary awarded by equity courts as ancillary "clean up" relief constituted legal relief that should not be available under Section 502(a)(3). See 534 U.S. at 210; see *id.* at 234 (Ginsburg, J., dissenting) (under the dissenting Justices' construction of Section 502(a)(3), compensatory and punitive "clean up" relief would be unavailable); cf. *CIGNA*, 131 S. Ct. at 1880 (recognizing that "equitable relief" encompasses compensation from a *fiduciary* for losses).

Permitting plan fiduciaries to seek a deficiency judgment when the beneficiary no longer possesses the funds in question would render Section 502(a)(3)'s limitation on available relief "superfluous." *Mertens*, 508 U.S. at 258. If a plan could simply seek a deficiency judgment whenever there is no longer an identified fund in the beneficiary's possession, the equitable-lien action recognized in *Great-West* would become an empty formality. Simply by invoking an equitable lien in its pleadings, the fiduciary would be able to obtain

compensatory relief out of the beneficiary's general assets.

### C. Permitting A Fiduciary To Enforce An Equitable Lien Only Against Identified Third-Party Recovery Funds In The Defendant's Possession Is Consistent With ERISA's Design

Under *Great-West* and the relevant equitable principles, a fiduciary may obtain reimbursement from a beneficiary by enforcing an equitable lien on an identified fund (or commingled funds or identifiable property for which the fund was exchanged) in the beneficiary's possession, but it may not seek to impose personal liability on a beneficiary who has spent the funds in question. 534 U.S. at 220-221. That result follows from Congress's decision to limit the available relief to "equitable relief." 29 U.S.C. 1132(a)(3).

It is true that there will be some cases in which the fiduciary will be unable to recover the reimbursement to which it is entitled under the plan. That consequence can prevent full effectuation of ERISA's purpose to protect and enforce plan terms. See *US Airways*, 133 S. Ct. at 1548. But the potential for beneficiaries to dissipate third-party recoveries has been clear since *Great-West*. Congress has not acted to override this Court's construction of Section 502(a)(3) in reimbursement cases. Fiduciaries, moreover, have adopted several practices that should enable them to protect their rights to reimbursement in most cases.

#### *1. Great-West indicates that the present-possession requirement is not inconsistent with ERISA*

Respondent contends that it would be "truly inequitable" to hold that plan fiduciaries may not obtain reimbursement when the beneficiary no longer pos-

sesses the funds in question. Br. in Opp. 20. This Court rejected that same argument in *Great-West*, where the equities between the parties were materially similar to those at issue here. 534 U.S. at 220. There, the fiduciary had attempted to protect its interest in reimbursement by notifying the beneficiary of that interest, attempting to negotiate a settlement of its claim, and seeking an order restraining dissipation of the settlement fund. *Id.* at 207-208. Despite knowing of the fiduciary's claim, the beneficiary sought state-court approval of a settlement contemplating that the money would be disbursed without reserving the amount in dispute. Ct. Appointed Amicus Br. at 10, *Great-West*, *supra* (No. 99-1786); *Great-West*, 534 U.S. at 208, 214. Notwithstanding the fiduciary's contention that the beneficiary had knowingly breached her obligations under the plan by refusing to reimburse the plan, Pet. Br. at 24, *Great-West*, *supra* (No. 99-1786), the Court held that the fact that the beneficiary did not possess the funds in question was dispositive. 534 U.S. at 214-215, 220.

*Great-West* also rejected the fiduciary's argument that disallowing reimbursement when the beneficiary did not possess the funds in question was inconsistent with ERISA's "basic purpose" of enforcing plan terms. 534 U.S. at 220-221 (citation omitted). The Court explained that while Congress provided beneficiaries with a broad right to file suit "to enforce [their] rights under the terms of the plan," 29 U.S.C. 1132(a)(1)(B), Congress "did not extend the same authorization to fiduciaries." *Great-West*, 534 U.S. at 221. Instead, Congress limited the situations in which fiduciaries may use Section 502(a)(3) to enforce plan terms to cases in which they seek "equitable relief."

Since *Great-West*, moreover, the possibility that fiduciaries may be unable to obtain reimbursement of already-disbursed funds has been clear.[7] Had Congress disagreed with the Court's construction of "equitable relief" in *Mertens* and *Great-West*, or the logical implication that fiduciaries may be left without a reimbursement remedy when the beneficiary does not possess the third-party recovery fund (or substitute assets) at the time of suit, it could have amended Section 502(a)(3). See *Kimble* v. *Marvel Entm't, LLC*, No. 13-720, 2015 WL 2473380, at *7 (June 22, 2015); see also *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (suggesting that Congress should overturn this Court's construction of Section 502(a)(3)).

Notably, Congress has overturned the Court's construction of "equitable relief" in the context of certain claims by participants and beneficiaries. In 1994, Congress amended Section 502(a)(3) to provide that beneficiaries and the Secretary of Labor may sue for "appropriate relief" in connection with a fiduciary's conduct in terminating certain pension plans. See Pension Annuitants Protection Act of 1994, Pub. L. No. 103-401, 108 Stat. 4172, 4172; 139 Cong. Rec.

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[7] See, *e.g.*, Bart A. Karwath, *ERISA Health Plan Reimbursement Claims After* Great-West Life & Annuity Insurance Co. v. Knudson, 47 Res Gestae 36, 39 (Apr. 2004) ("The Supreme Court's decision in *Great-West* has made it more difficult for ERISA plans to enforce their reimbursement provisions."); see also Philip R. O'Brien & Sarah A. Huck, *Preservation of Plan Assets Through Subrogation and Reimbursement Rights*—Part 2, 44 Benefits & Comp. Digest 24, 26 (Feb. 2008) ("One of the major problems created by [*Great-West*] is that its requirement that the settlement funds be identifiable and not paid out provides an incentive for plan participants to try to 'hide' and 'dissipate' settlement funds.").

17,876 (1993) (statement of Sen. Metzenbaum) (bill was intended to overturn *Mertens*' construction of "equitable relief" as applied to certain pension claims). After *Great-West*, Congress considered amending Section 502(a)(3), but did not ultimately do so. See, *e.g.*, Employee Pension Freedom Act of 2002, H.R. 3657, 107th Cong. § 403(c) (2002).

***2. Plan fiduciaries have available methods of protecting their reimbursement interests***

Since *Great-West*, fiduciaries have used several methods to protect their right to reimbursement and preserve their ability to enforce an equitable lien.

As an initial matter, fiduciaries have taken a number of steps to ensure that they receive adequate notice when their reimbursement rights are implicated. A fiduciary will generally learn that it may have reimbursement rights when the participant requests medical or other benefits after an incident for which a third party may be liable. Plans often require the participant to pursue a third-party recovery, and then require the participant to provide notice of any tort action or settlement. See Johnny Parker, *The Common Fund Doctrine: Coming of Age in the Law of Insurance Subrogation*, 31 Ind. L. Rev. 313, 331 (1998). Supplementing notice requirements, plans monitor the progress of participant suits against third-party sources. See Philip R. O'Brien & Sarah A. Huck, *Preservation of Plan Assets Through Subrogation and Reimbursement Rights*—Part 2, 44 Benefits & Comp. Digest 24, 26 (Feb. 2008) (*Preservation*) ("[I]t is vital that plans * * * monitor continuously the underlying actions to ensure that funds are not spent before the plans are reimbursed.").

In some cases, fiduciaries will not need to rely on a subsequent reimbursement action under Section 502(a)(3) to recoup their costs. Plan terms often give the fiduciary the right to file suit directly against any third-party tortfeasors as a subrogee of the beneficiary's claims, and plans may exercise that option when subrogation is permitted under state law. See, *e.g.*, *Atteberry* v. *Memorial-Hermann Healthcare Sys.*, 405 F.3d 344, 348-349 (5th Cir.), cert. denied, 546 U.S. 936 (2005); *Dayton Hudson Dep't Store Co.* v. *Auto-Owners Ins. Co.*, 953 F. Supp. 177, 179 (W.D. Mich. 1995). Alternatively, the fiduciary may be able to intervene in the participant's tort suit in order to protect its interest in any recovery. See, *e.g.*, *Maricco* v. *Meco Corp.*, 316 F. Supp. 2d 524 (E.D. Mich. 2004); *Crump* v. *Wal-Mart Grp. Health Plan*, 925 F. Supp. 1214, 1216 (W.D. Ky. 1996).

Even when a fiduciary does not participate directly in an action against a third party, it can protect its reimbursement rights by expeditiously asserting them. See *Preservation* 26; C. Mark Humbert, *The Supreme Court Revisits Third-Party Reimbursement Claims Under ERISA:* Sereboff v. Mid-Atlantic Medical Services, Inc., 18 Health Law. 1, 4 (Aug. 2006) (fiduciaries should "act *quickly* to enforce an equitable lien by assignment or agreement, * * * before the recovery is dissipated"). Since *Great-West*, plans seeking reimbursement have routinely been able to obtain TROs requiring the disputed portion of the recovery to be set aside pending resolution of the reimbursement claim. See, *e.g.*, *Sereboff*, 547 U.S. at 360 (fund was segregated after fiduciary sought TRO); *Crawford & Co. Med. Benefit Trust* v. *Repp*, No. 11C50155, 2011 WL 2531844 (N.D. Ill. June 24, 2011);

*Mank* v. *Green*, 297 F. Supp. 2d 297 (D. Me. 2003); see also *Diamond Crystal Brands, Inc.* v. *Wallace*, 531 F. Supp. 2d 1366 (N.D. Ga 2008). In addition, when settlement funds are disbursed to the participant's attorney, ethical rules may require the attorney to set aside funds in which the fiduciary has asserted an interest. See, *e.g.*, ABA, *Model Rules of Professional Conduct* 1.15(e) (2013).

### D. A Remand Is Necessary To Determine The Extent To Which Petitioner Possesses Funds Or Property Against Which Respondent May Enforce Its Equitable Lien

Respondent may enforce its equitable lien only against specific, identified funds (or commingled funds or identifiable property for which the funds were exchanged) that remain in petitioner's possession. In this case, such funds may no longer exist. Pet. App. 35 n.2; Pet. Br. 9.

Respondent does not appear to have availed itself of any of the numerous ways in which fiduciaries may protect their reimbursement rights. Respondent does not assert that it attempted to participate in or monitor petitioner's action against potentially liable third parties. See Compl. ¶¶ 14-15 (alleging on "information and belief" that petitioner had filed suit and received a settlement). Although the parties negotiated over respondent's reimbursement claim for several months, respondent did not seek a TRO during that time, even when petitioner's attorney stated that he intended to disburse funds after 14 days. Indeed, respondent waited to file this suit until approximately six months later. See p. 2, *supra*. In all, over a year passed between the start of negotiations and respondent's initiation of this suit.

When the district court issued its decision, it was unclear whether petitioner still possessed any of the funds at issue. See note 2, *supra*. The district court did not resolve the parties' dispute about that question. In addition, circumstances may have changed in the intervening period. The case should be remanded to permit the lower courts to determine the extent to which respondent may enforce its equitable lien against funds or property in petitioner's possession.

## II. IF THE COURT CONCLUDES THAT A DEFICIENCY JUDGMENT OR LIEN-DESTRUCTION DAMAGES CONSTITUTES "EQUITABLE RELIEF," THE COURT SHOULD REMAND TO PERMIT THE LOWER COURTS TO DETERMINE WHETHER RESPONDENT HAS ESTABLISHED THE ELEMENTS OF THOSE CLAIMS

Even if this Court were to conclude that the monetary remedies respondent proposes are "equitable relief" under Section 502(a)(3), respondent would not be entitled to relief unless it can satisfy the prerequisites for receiving a deficiency judgment or damages. Cf. *CIGNA*, 131 S. Ct. at 1881 (beneficiary seeking equitable remedy of surcharge must satisfy the requirements of that cause of action). Although respondent argued below that it was entitled to reimbursement in the form of an equitable lien, it did not also assert that the court should award a deficiency judgment or damages. See J.A. 37-40. A remand would therefore be necessary to permit the lower courts to determine whether respondent is entitled to any monetary relief under either theory.

A. Because a deficiency judgment is designed to supplement the proceeds of a foreclosure sale, the remedy presupposes that the defendant possessed

some property subject to the plaintiff's lien, and the court was able to order a sale of that property. Courts therefore did not award a deficiency judgment when they were unable to order a foreclosure sale of the underlying property subject to the lien. See 1 *Pomeroy* § 240, at 451-452 ("[T]here can be no deficiency judgment in a foreclosure proceeding where the principal cause of action fails."); *City Bank* v. *Plank*, 124 N.W. 1000, 1003 (Wis. 1910) ("The order for deficiency judgment is so dependent on, and merely ancillary to, the foreclosure and sale that it would be absurd left standing alone.").

As a result, an ERISA fiduciary seeking a deficiency judgment would have to demonstrate that the beneficiary retains a portion of the recovery, such that the fiduciary's equitable lien is enforceable against that portion. Only in that circumstance could the fiduciary seek a deficiency judgment for the remainder of reimbursement amount. On remand, respondent would need to demonstrate that petitioner still possesses a portion of his recovery.

B. An action for damages for dissipating property subject to a lien required the plaintiff to demonstrate that the defendant had acted in bad faith, with knowledge of the plaintiff's rights in the lien and the intent to defeat those rights. See *Hovey*, 23 N.E. at 478 ("action at law" "would * * * lie" in event of sale with "intent to defraud or injure the plaintiffs in their lien, or with any purpose to defeat it"); see also *George Adams & Frederick Co.* v. *South Omaha Nat'l Bank*, 123 F. 641, 645 (8th Cir. 1903) (claim based on defendant's "wrongful[]" dissipation of property subject to a lien); *Yates* v. *Joyce*, 11 Johns. 136 (N.Y. Sup. Ct. 1814); *Jones* § 95, at 65.

Respondent would therefore have to demonstrate that petitioner spent the proceeds of his suit with knowledge of respondent's claim and the intent to deprive respondent of its right to reimbursement. Cf. *Jones* § 1036, at 679; 90 C.J.S. *Trover and Conversion* § 4 (2010) (stating intent requirement). While petitioner's knowledge of respondent's claim may be inferred from his attempt to settle the reimbursement dispute, there is currently no other evidence in the record concerning petitioner's intent in spending the portion of the recovery that he received.

## CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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JULY 2015